APPENDIX TO APPELLANTS' BRIEF.

Relevant Docket Entries.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

EMIL STEIN and WILLIAM B. STEIN, *et als.*, Plaintiffs, *vs.* PRESTON DELANO, Comptroller of the Currency, *et als.*, Defendants.	Civil 829.

1940

Mar. 2. Complaint filed.

Mar. 4. Order to show cause for relief filed.

Mar. 18. Hearing on order to show cause for relief. Decision reserved. Hearing on motion to dismiss action as to E. Lorry Keeton, Receiver. Decision reserved.
Hearing on motion for special appearance on behalf of defendant Preston Delano, Comptroller and to quash service of summons. Decision reserved.

Mar. 18. Order granting intervention of Walter H. Cole and Frank W. Miller filed.

Aug. 12. Order permitting Edward M. Waldron *et al.* to intervene, filed.

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Aug. 12. Order permitting Harvey G. Reddan and John I. Spooner to Intervene, filed.

Aug. 26. Order allowing intervention of John F. Monahan and Frank J. McCann, filed.

Oct. 16. Memorandum filed. (Walker, *J.*)

Oct. 21. Order allowing intervention of Federal Trust Co. and Lawyers' Title Guaranty Co. of N. J. filed.

Nov. 18. Order of substitution of defendant receiver, filed.

Nov. 18. Order of substitution of intervening plaintiff filed.

Nov. 25. Order quashing service and dismissing bill of complaint filed.

Dec. 2. Notice of appeal, filed.

Dec. 2. Bond on appeal, filed.

Dec. 10. Stipulation made by E. Lorry Keeton, Receiver, in open Court on March 18, 1940.

Dec. 10. Stipulation designating record on appeal.

Complaint.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

EMIL STEIN and WILLIAM B. STEIN, Plaintiffs, *vs.* PRESTON DELANO, Comptroller of the Currency, and E. LORRY KEETON, Receiver of New Jersey National Bank and Trust Company of Newark, New Jersey, Defendants.	Civil Action. Complaint.

Plaintiffs, stockholders of the New Jersey National Bank and Trust Company of Newark, New Jersey, on behalf of themselves, the New Jersey National Bank and Trust Company of Newark, New Jersey, (a National Banking Association organized under the laws of the United States of America) and all other stockholders thereof similarly situated, complaining of the defendants, say that:

1. This action arises under the United States Code, Title 12, Chapter 2, as hereinafter more fully appears, to enjoin the Comptroller of the Currency and a receiver acting under his direction as provided by said chapter.

2. The New Jersey National Bank and Trust Company of Newark, New Jersey, was and is a National Banking Association organized and existing under the laws of the United States of America, having its principal place of

business in the City of Newark, County of Essex, and State of New Jersey, and in the District of New Jersey.

3. The plaintiff, Emil Stein, prior to June 11, 1932 and ever since has been and still is the owner and holder of one hundred and nineteen (119) shares of the capital stock of the New Jersey National Bank and Trust Company of Newark, New Jersey.

4. The plaintiff, William B. Stein, prior to June 11, 1932 and ever since has been and still is the owner and holder of ninety, (90) shares of the capital stock of the New Jersey National Bank and Trust Company of Newark, New Jersey.

5. On or about June 11, 1932, the then Comptroller of the Currency, acting pursuant to the authority vested in him under 12 U. S. C. Sections 191 and 192, appointed Chester P. Rogers receiver of the said New Jersey National Bank and Trust Company of Newark, New Jersey, who qualified and acted as such receiver until on or about May 19, 1938, when he resigned; thereupon, Joseph O'Shaughnessy was appointed his successor, qualified and acted as such until on or about September 23, 1939, at which time he resigned; whereupon E. Lorry Keeton, one of the defendants herein, was appointed his successor, and he qualified and has been and still is acting as such receiver.

6. From time to time, after full provision had first been made for refunding to the United States of America any deficiency in redeeming the circulating notes of said association, the defendant, Preston Delano, who is the Comptroller of the Currency of the United States of America, and his predecessors in office paid dividends on all claims previously proved or adjudicated as required under the terms and provisions of 12 U. S. C. Sec. 194.

7. The defendant, Preston Delano, Comptroller of the Currency as aforesaid, and his predecessors in office have

made provision for the payment of, or have paid out of the monies turned over to said defendant Comptroller and his predecessors in office, by the defendant receiver and his predecessors in office, one hundred per cent on all claims of creditors of said association, which had been proved to the satisfaction of said defendant receiver and his predecessors in office, or adjudicated in a court of competent jurisdiction, (but not including shareholders who are also creditors of said association); and said defendant Comptroller has paid or has in his possession, sufficient monies out of which to pay the expenses of the receivership of the said association.

7a. In connection with and prior to the payment to the former creditors of said association of one hundred per cent of their claims as hereinbefore set forth, an assessment of one hundred per cent upon all the outstanding capital stock of $2,800,000.00 of said association was levied by the Comptroller of the Currency, and plaintiffs allege, upon information and belief, that upwards of $1,000,000.00 has been paid to the defendant receiver and his predecessors in office thereon by the shareholders of said association.

8. Pursuant to 12 U. S. C. Sections 192 and 194, the assets now in the possession of the defendant Comptroller are payable to the shareholders of said association or their legal representatives in proportion to the stock respectively by them held, and it is the duty of the defendant Comptroller, pursuant to 12 U. S. C. Sec. 197, to call a meeting of the shareholders of said association for the purpose of determining whether the defendant receiver shall be continued and shall wind up the affairs of said association or whether an agent shall be elected for such purpose of said shareholders—in either of which instances, the person selected by the shareholders is accountable to this Court, and not the Comptroller of the Currency, for his conduct in the administration of the trust estate.

9. Defendant Comptroller has refused to call a meeting of the shareholders of said association for the purposes mentioned in the preceding paragraph, in order that the assets now in the possession of the defendants might be paid over to said shareholders or their legal representatives in proportion to the stock by them respectively held; and notwithstanding formal, written demand therefor has been made upon the office of the said Comptroller, the defendants insist upon their alleged right to continue in possession of the assets of said association and to wind up its affairs for the sole purpose of paying to the former creditors of said association interest upon their respective claims.

10. The alleged interest upon the claims of the respective former creditors, for which defendants are insisting upon their right to continue in possession of said assets does not constitute a valid, legal and subsisting obligation of the said association, and the actions of said defendants in that respect are illegal, unlawful, and prejudicial to the interests of plaintiffs and the association, and all of the other shareholders thereof.

11. Unless this Court intervenes and enjoins said defendants from continuing in possession of the assets of said association for the purpose of winding up its affairs and paying interest to the former creditors thereof upon their respective claims, defendants, in accordance with their expressed intentions, will make such payments of interest from time to time, and the recovery back from said various payees by the shareholders of said association will involve a multiciplicity of suits and the expenditure of tremendous sums of money, all to the irreparable damage of plaintiffs, the association, and all the other shareholders thereof.

12. Plaintiffs are informed and verily believe that the monies and other assets of said association not yet liquidated, in the possession of defendants, amount to upwards

of $750,000.00, and if defendants are permitted to carry out their expressed intentions of paying said funds to former creditors of the association as interest upon their respective claims, plaintiffs, the association and the other shareholders thereof will have been deprived of said fund which is rightfully theirs, and their sole recourse will be to attempt to recover back payments from said former creditors, all of which will involve exorbitant expense and the institution of multifarious suits, the ultimate result and success of which is and will be extremely doubtful.

13. Notwithstanding the fact that plaintiffs, the association, and the other shareholders thereof are presently the equitable owners of the assets of said association, defendants threaten to continue the liquidation of the association's remaining assets for the sole purpose of paying the interest as aforesaid, all of which said acts, plaintiffs charge to be unwarranted and illegal, and an abuse of the power vested in them by law; and for the method, manner, and expense involved in their conduct in that respect defendants are and will be accountable to no one.

14. The assets of said association now in the possession of defendants constitute a trust fund for the benefit of the association and all the stockholders thereof, and defendants have no further legal or equitable claim or interest therein.

15. In order to preserve the assets of said association, constituting the trust estate for the benefit of plaintiffs, the association, and all the other shareholders thereof, and in order to control the expense of management thereof until defendant Comptroller shall have called the shareholders' meeting pursuant to 12 U. S. C. Sec. 197, and the agent of the shareholders shall have been elected, this Court should take said assets into its custody by appointing a receiver or receivers, trustee or trustees, thereof who shall be accountable to it for all actions with respect to said trust estate until the further order of this Court.

16. Plaintiffs are informed and verily believe that defendant receiver is presently engaged in the maintenance of various expensive legal proceedings, and is continuing the employment of a staff of employees, agents, and attorneys at the expense of said trust estate, a great part of which would be avoided by the appointment of a receiver or receivers, trustee or trustees by this Court, to devote his or their time exclusively to the liquidation of said assets, and the administration of said trust estate, in place and stead of the said defendant receiver who is presently engaged as receiver of approximately six other institutions, among all of which his time and efforts are of necessity divided.

17. Plaintiffs were shareholders of said association at the time of all the transactions referred to herein, and this action is not a collusive one to confer on a Court of the United States of America jurisdiction of any action of which it would not otherwise have jurisdiction.

18. Plaintiffs have been unable to secure from the managing directors of said association the action which they desire, due to the fact that since the appointment of a receiver of said association on or about June 11, 1932, there have been no managing directors or executive officers in charge of said association, the defendant receiver and his predecessors in office having at all times since June 11, 1932 assumed complete charge of all of the affairs of said association; and plaintiffs' requests and demands of the defendants as hereinbefore set forth, have proved futile and unavailing, and said defendants have refused to comply with plaintiffs' requests and demands.

19. Plaintiffs are without other adequate remedy to prevent the threatened illegal and unconstitutional acts of defendants in depriving the association and all of its shareholders of the assets of said association.

20. If this Honorable Court does not enjoin defendants from carrying out their expressed threats to apply the assets of the New Jersey National Bank and Trust Company of Newark, New Jersey toward the payment of interest upon the claims of former creditors of the said association, there exists no adequate remedy at law to protect the constitutional and property rights of the said association and all its shareholders.

WHEREFORE, plaintiffs pray:

1. That the Court order this cause to be heard upon application for a preliminary injunction, (which is hereby made) and that the Court upon such application and hearing issue a preliminary injunction, pending the trial of this cause, the outcome thereof, and the further order of this Court:

(a) enjoining the said defendant Preston Delano, Comptroller of the Currency, and the said defendant E. Lorry Keeton, receiver of the New Jersey National Bank and Trust Company of Newark, New Jersey, from further retaining possession of the assets of said association, and from winding up its affairs, and from taking any action whatever with respect thereto or to the payment of interest upon claims of former creditors of said association;

(b) appointing a receiver or receivers, trustee or trustees of the assets of the New Jersey National Bank and Trust Company of Newark, New Jersey, as a trust estate for the benefit of the association and all the shareholders thereof.

2. That upon final hearing of this cause, the Court order, adjudge and decree:

(a) that the defendant, Preston Delano, Comptroller of the Currency, and the defendant, E. Lorry Keeton, receiver of the New Jersey National Bank

and Trust Company, of Newark, New Jersey, be permanently enjoined from further retaining possession of the assets of said association, and from winding up its affairs, and from taking any action whatever with respect to the payment of interest upon claims of former creditors of said association;

(b) that the defendant, Preston Delano, Comptroller as aforesaid, be ordered to forthwith call a meeting of the shareholders of the New Jersey National Bank and Trust Company of Newark, New Jersey, in the manner and form, and for the purpose specified and set out in 12 U. S. C. Sec. 197;

(c) that it be declared and decreed that interest upon obligations held by former creditors of the said association be not a valid, legal and subsisting obligation of the said association to the end that all of the assets of said association be distributed among the shareholders of said association, pursuant to 12 U. S. C. Sec. 197 without any deduction therefrom for interest alleged to be due upon the said claims of former creditors.

(d) that it be declared and decreed that the assets of said association now in the possession of defendants constitute a trust fund for the benefit of the association and all the shareholders thereof, and that defendants have no further legal or equitable claim or interest therein.

3. That the defendants account to this Court for their acts and conduct while in possession of the assets of said association since the declaration of the final dividend completing the payment of one hundred per cent. upon the claims of the former creditors of said association.

4. That plaintiffs be reimbursed for their costs, expenses and counsel fees in prosecuting this suit.

5. That the plaintiffs have such other, further, and general relief as the nature of the case may require and the Court may deem just and proper in the premises.

Dated March 1, 1940.

KRISTELLER & ZUCKER,
(Signed) By SAUL J. ZUCKER,
A member of the firm.
Attorneys for Plaintiffs,, Office and Post Office Address, 744 Broad Street, Newark, New Jersey.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

WILLIAM B. STEIN, being duly sworn on his oath, according to law, deposes and says:

I reside in the City of East Orange, County of Essex and State of New Jersey; I am one of the plaintiffs above named; I have read the foregoing complaint and know the contents thereof, and the same are true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.

WILLIAM B. STEIN.

Subscribed and sworn to before me }
this 1st day of March, 1940. }

MILTON LOWENSTEIN,
A Master in Chancery of New Jersey.

Order to Show Cause.

Upon reading and filing the duly verified complaint of Emil Stein and William B. Stein, plaintiffs in the above entitled cause, and good cause appearing therefor, it is on this 4th day of March, Nineteen Hundred and Forty, on motion of Kristeller & Zucker, attorneys of said plaintiffs,

ORDERED, That Preston Delano, Comptroller of the Currency, and E. Lorry Keeton, Receiver of New Jersey National Bank and Trust Company, of Newark, New Jersey, show cause before this Court, on Monday, the 18th day of March, Nineteen Hundred and Forty, at the United States District Court Rooms, Post Office Building, Federal Square, Newark, New Jersey, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard,

(1) Why the relief prayed for in the complaint should not be granted, and

(2) Why the said Preston Delano, Comptroller of the Currency, and E. Lorry Keeton, Receiver of the New Jersey National Bank and Trust Company, of Newark, New Jersey, should not, pending the final hearing in this cause, the outcome thereof and the further order of this Court, be enjoined from further retaining possession of the assets of the New Jersey National Bank and Trust Company, of Newark, New Jersey, or from taking any action with respect thereto, and especially with respect to the payment of interest upon the claims of the former creditors of said Association, and

(3) Why a receiver or receivers, trustee or trustees, should not be appointed of the assets of the New Jersey National Bank and Trust Company, of Newark, New Jersey, pending the final hearing in this cause, the outcome thereof, and the further order of this Court; and it is further

ORDERED, That answering affidavits of the defendants, if any, to be used upon the argument of this order to show cause, be served upon the plaintiffs, or their attorneys, at least 5 days before the return date hereof; and it is further

ORDERED, That plaintiffs have leave to file such reply affidavits upon the argument as they shall be advised are proper; and it is further

ORDERED, That a copy of this order and a copy of the summons and verified complaint herein be served upon the defendants in accordance with the provisions of the Rules of Civil Procedure for the District Courts of the United States, at least 10 days before the return date hereof.

THOMAS GLYNN WALKER,
U. S. D. J.

Notice of Special Appearance and of Motion to Quash Process.

To Kristeller & Zucker, attorneys for plaintiffs:

PLEASE TAKE NOTICE, that on Monday, March 18, 1940, at 10:30 o'clock, or as soon thereafter as counsel can be heard, at the Federal Building, Newark, New Jersey, we shall apply to the Court for leave to enter a special appearance on behalf of the defendant Preston Delano, Comptroller of the Currency, for the purpose of objecting to the exercise of jurisdiction herein by this Court, and moving to quash the service of summons attempted to be made upon him, on the grounds that said Preston Delano is a resident, citizen and inhabitant of the District of Columbia, that he is not, and was not, subject to service of process within the District of New Jersey, and has not, as will appear from the return of said summons, been properly served with

process in this action, and that the attempt to serve him in the District of Columbia with process herein is without authority of law, and that this case is not one which comes within the provisions of section 57 of the Federal Judicial Code.

AND TAKE FURTHER NOTICE, that, appearing specially as aforesaid, we shall also move to dismiss the bill of complaint herein as to said Preston Delano, Comptroller of the Currency, on the ground that this Court has not acquired jurisdiction over him as defendant, or over the subject matter of this action, and that this case is not one which comes within the provisions of section 57 of the Judicial Code so as to give this Court jurisdiction over the defendant or over the subject matter of this action.

J. H. HARRISON,
Appearing specially for the Defendant, Preston Delano, Comptroller of the Currency, for the purposes of the aforesaid motions only.

Dated: Newark, New Jersey,
March 12th, 1940.

Notice of Motion to Dismiss.

To Kristeller & Zucker, Attorneys for Plaintiffs:

PLEASE TAKE NOTICE, that on Monday, March 18, 1940, at ten-thirty o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Federal Building, Newark, New Jersey, we shall apply to the Court for a motion to dismiss the action against E. Lorry Keeton, Receiver of New Jersey National Bank and Trust Company of Newark,

because the complaint fails to state a claim against him upon which relief can be granted.

J. H. Harrison,
Attorney for Defendant, E. Lorry Keeton, Receiver of New Jersey National Bank and Trust Company of Newark.

Dated: Newark, New Jersey,
March 12th, 1940.

Affidavit.

State of New Jersey, }
County of Essex. } ss.:

E. Lorry Keeton, of full age, being duly sworn according to law, upon his oath deposes and says:

I am Receiver of New Jersey National Bank and Trust Company of Newark, N. J., and one of the defendants in the above entitled action.

William B. Stein, one of the plaintiffs in this action, is indebted to me, as Receiver of said New Jersey National Bank and Trust Company of Newark, on three promissory notes, as follows:

On a note dated June 3, 1932, maturing three months after date, in the original principal sum of $1,350.00, for a principal balance of $561.31 and accrued interest on the reducing balances of said note from September 6, 1932.

On a note dated March 30, 1932, maturing three months after date, in the original principal sum of $1,700., for a principal balance of $800.00 and accrued interest on the reducing balances of said note from June 30, 1932.

On a note dated March 18, 1932, maturing three months after date, in the original principal sum of $23,300., for a principal balance of $11,989.72 and accrued interest on the reducing balances of said note from June 20, 1932. Said William B. Stein is also indebted to me, as Receiver as aforesaid, for a principal balance of $2,245.00 on a stock assessment levied against shares of stock of the New Jersey National Bank and Trust Company of Newark owned by him, in the principal sum of $2,250.00, together with interest on said assessments from September 12, 1932.

Emil Stein, the other plaintiff in this action, is obligated to me, as Receiver of said New Jersey National Bank and Trust Company of Newark, upon a written surety guaranty of a line of credit of William B. Stein & Company in the sum of $15,000.00. Said William B. Stein & Company is still indebted to me, as Receiver as aforesaid, in the sum of $11,989.72, besides accrued interest, upon a promissory note dated March 18, 1932, maturing June 20, 1932. Said Emil Stein is also indebted to me on a stock assessment for $7,000.00, levied against him by the Comptroller of the Currency upon stock owned by him and transferred within sixty days prior to the failure of said bank into the name of New Jersey Finance Company, together with accrued interest on said assessment from September 12, 1932.

The above named plaintiffs, Emil Stein and William B. Stein, instituted action against me in the Essex County Circuit Court January 22, 1940 for declaratory judgments. The subject matter of their said actions was the notes, stock assessments and guaranty above mentioned. The said declaratory judgment suits were removed to this Court, by order of the Essex County Circuit Court dated February 16, 1940, a transcript of the proceedings in the State court has been duly filed, and my answer has also been filed.

The liquidation of the New Jersey National Bank and Trust Company of Newark has been conducted under the

supervision of the Comptroller of the Currency by my predecessors and myself as Receiver, since June 11, 1932. During that period, dividends of one hundred per cent of the principal of claims of the depositors and creditors have been paid, as stated in the bill of complaint herein. At the time payment was made to the depositors and creditors of the five per cent dividend which made up the one hundred per cent payment to the depositors and creditors, each depositor and creditor receiving said dividend was required to receipt therefor on a form, a blank copy of which is attached hereto, made a part hereof by reference and marked Exhibit "A". At the same time, each depositor and creditor presented his Receiver's Certificate of Proof of Claim and the payment of the fifth dividend of five per cent, representing the final principal dividend, was endorsed on each certificate. At the same time, there was attached by the Receiver's office to each Certificate of Proof of Claim, a notice in the form annexed hereto, made a part hereof and marked Exhibit "B". This notice was securely fastened by wire brads to each certificate in the manner indicated by said exhibit. The legend on said notice states that a further dividend, representing all or part of the accrued interest on the claim, will be paid when liquidation of the remaining assets warrants such a distribution.

As Receiver of New Jersey National Bank and Trust Company of Newark, I am a bonded officer of the United States of America, acting under the supervision of the Comptroller of the Currency of the United States of America and appointed pursuant to the statutes in such case made and provided. I have been associated with the receivership of said New Jersey National Bank and Trust Company of Newark during the entire period of its liquidation, formerly as assistant to the Receivers and now as Receiver, and I am thoroughly familiar with the affairs of said receivership and the remaining assets. The liquidation of the bank has resulted in payment of dividends aggre-

gating one hundred per cent to the depositors and creditors, as above noted. The entire cost of the liquidation, including all operating expenses, Receivers' and employees compensation, legal fees and administrative disbursements of every nature, aggregate 3.4% of the total collections. If, to those expenses, is added the interest paid to the Reconstruction Finance Corporation on moneys borrowed for the purpose of paying the first and second dividends to depositors and creditors, the ratio of expense to total collections is 3.79%. These percentages were taken from the last quarterly report of this receivership to the Comptroller's office, dated December 31, 1939. As of the same date, the total interest collections of the receivership exceeded the total administrative expenditures by slightly in excess of $100,000.00, so that the receivership has been conducted without any expense charged to the principal of the assets up to the present time.

E. Lorry Keeton,
Receiver of New Jersey National
Bank & Trust Company of Newark.

Subscribed and sworn to before me
this 13th day of March, 1940.

Louise A. Robins,
Notary Public.

Exhibit "A."

CLAIM No.

AGAINST NEW JERSEY NATIONAL BANK AND TRUST COMPANY OF NEWARK, NEW JERSEY

READ CAREFULLY

Upon return of this Receipt, properly signed and accompanied by the original RECEIVER'S CERTIFICATE OF PROOF OF CLAIM, to JOSEPH O'SHAUGHNESSY, RECEIVER, Belmont Avenue and Court Street, Newark, N. J., check for THE FIFTH (Final) Principal Dividend of 5 percent will be mailed or delivered to the Claimant.

If Claimant is deceased and a personal representative has been appointed, a CERTIFIED COPY OF SUCH APPOINTMENT indicating that the powers granted are still in force must accompany the Receipt.

Date

RECEIVED FROM THE COMPTROLLER OF THE CURRENCY, CHECK.

PAYABLE TO THE ORDER OF $

DOLLARS

IN PAYMENT OF FIFTH (Final)
PRINCIPAL DIVIDEND OF 5 PERCENT.

(Sign Here) .....
Write name exactly as shown above

Identified by .....

Address .....

Exhibit "B."

To The Depositors of the New Jersey National Bank and Trust Company of Newark, N. J.

"The check you are receiving herewith represents the fifth and final PRINCIPAL dividend of 5% which, according to the endorsement on your RECEIVER'S CERTIFICATE OF PROOF OF CLAIM, completes payment of the PRINCIPAL portion of your CLAIM. The assets have not been fully liquidated and a further DIVIDEND representing all or part of the accrued INTEREST on the CLAIM will be paid when liquidation of the remaining assets warrants such a distribution."

Do Not Destroy Your Certificate

"Carefully preserve the Receiver's Certificate of Proof of Claim attached, as it must be surrendered to the Receiver when the interest dividend is paid."

E. L. KEETON, Receiver
New Jersey National Bank and Trust Company

Stipulation in Open Court on March 18, 1940.

Mr. E. Lorry Keeton, Receiver of the New Jersey Bank and Trust Company, being present here in court, authorizes me to make the statement for him that, pending the determination of the meritorious questions involved in this litigation, specifically the question of whether or not the depositors and other creditors of the bank are entitled to interest upon their claims, no distribution of the funds in the hands of the Receiver, other than for ordinary administrative expenses, will be made.

The purpose of his undertaking is to preserve intact the funds available for distribution to stockholders or creditors until the question of who is entitled to said funds shall have been determined.

Memorandum.

UNITED STATES DISTRICT COURT,

District of New Jersey.

Emil Stein and William B. Stein,
Plaintiffs,

vs.

Preston Delano, Comptroller of the Currency, and E. Lorry Keeton, Receiver of New Jersey National Bank and Trust Company of Newark, New Jersey,
Defendants.

Memorandum.
Civil Action No. 829.
Reported in 35 Fed. Supp. 260.

Appearances:

Messrs. Kristeller & Zucker,

By: Saul J. Zucker, Esq.,
Attorneys for the plaintiffs and attorneys for Intervening plaintiffs, Walter H. Cole and Frank W. Miller.

Messrs. Bilder, Bilder & Kaufman,

By: Walter J. Bilder, Esq.,
Attorneys for Intervening plaintiffs, Edward M. Waldron, William J. Waldron, Robert E. Waldron, Samuel F. Dixon, Bernard Miller, Philip Lindeman, Arthur W. Barlow and Edward M. Waldron, Executor of the Estate of Mary Waldron, deceased.

MESSRS. BURNETT & TRELEASE,

By: CHARLES C. TRELEASE, ESQ.,
Attorneys for Intervening plaintiffs, Harvey G. Redden and John I. Spooner.

MESSRS. ARMSTRONG & MULLEN,

By: ARTHUR C. MULLEN, ESQ.,
Attorneys for Intervening plaintiffs, John F. Monahan and Frank J. McCann.

MESSRS. HARRISON & ROCHE,

By: ROBERT F. DARBY, ESQ.,
Attorneys for the Receiver of the New Jersey National Bank and Trust Company of Newark, New Jersey, and Appearing Specially for Preston Delano, Comptroller of the Currency of the United States of America.

WALKER, District Judge.

This matter, by agreement of counsel, comes before the Court on final hearing.

The facts are:

1. The New Jersey National Bank and Trust Company of Newark, New Jersey was and is a national banking association, organized and existing under the laws of the United States of America.

2. On or about June 11, 1932, the then Comptroller of the Currency of the United States of America, pursuant to authority (Title 12 U. S. C. Sections 191, *et seq.*) appointed a receiver for said association, and thereafter the receiver and his successors undertook and proceeded with the necessary steps to close up such association.

3. An assessment of 100% upon all the outstanding capital stock has been levied and a substantial part thereof collected. Full provision has been made for the refunding to the United States of America any deficiency in redeeming the circulating notes of the association. The principal sum due on each creditor's claim (except those of shareholders, who are also creditors), proved or adjudicated as required under the terms and provisions of Title 12 U. S. C. Section 194, has been paid in full and the Comptroller has paid or has in his possession sufficient monies to pay the expenses of the receivership.

4. At the time each creditor presented his receiver's certificate of proof of claim for a fifth dividend of 5%, which 5% made a total payment of 100% on account of principal due, the receiver's office attached to each certificate of proof of claim a written notice that a further dividend representing all or part of the accrued interest on the claim would be paid when liquidation of the remaining assets warranted.

5. On March 2, 1940, the plaintiffs, as shareholders, on behalf of themselves and all other shareholders similarly situated[1] filed herein their complaint under Rule 23 (Federal Rules of Civil Procedure for District Courts), and thereby seek the following relief:

(a) a preliminary injunction and the appointment of a receiver, which need not be considered, because of a stipulation stated in open court.

(b) that the Comptroller be ordered to call a meeting of the shareholders for the purposes specified and set out in Title 12, U. S. C. Section 197.

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(1) (The Court notes and hereafter refers to the plaintiffs' allegations that they also file their complaint on behalf of the New Jersey National Bank and Trust Company of Newark, New Jersey.)

(c) that interest upon obligations held by former creditors be disallowed.

(certain other relief is sought; however, counsel have limited their argument to (c) and decision thereon determines whether the complaint stands or fails.)

6. The summons issued pursuant to Rule 4 (Federal Rules of Civil Procedure for District Courts) was served upon the Comptroller of the Currency at Washington in the District of Columbia on the 6th day of March, 1940, and said Comptroller appears specially and moves to quash same on the grounds that he is a resident, citizen and inhabitant of the District of Columbia and is not and was not subject to service of process in this, an action instituted in the District of New Jersey, and said service is without authority of law.

7. The receiver moves to dismiss the action against him and alleges the complaint fails to state a claim upon which relief can be granted.

The first question is:

Should the service of a summons in this, an action in the District of New Jersey, be quashed when it appears that it was made at Washington in the District of Columbia upon the Comptroller of Currency of the United States of America, a resident, citizen and inhabitant of said District of Columbia?

The long established and general rule regarding jurisdiction in personam, should be varied only in case of expressed statutory authorization.

The expressed statutory authorization upon which the plaintiffs rely is:

> "All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national

banking association, shall be had in the district where such association is located." (Section 49 of the Judicial Code.) Title 28 U. S. C. Section 110.

The proceedings herein are by persons who happen to be shareholders in a national banking association. The end they seek is a ratable distribution of the proceeds of the assets or property of the association remaining in the hands or subject to the order and control of the Comptroller and the receiver appointed by him (12 U. S. C. Section 197), without deduction of interest on the approved or adjudicated claims of creditors. The fruits of the litigation, if successful, will inure directly to their benefit, and while it can be admitted for the purposes hereof that they and those they represent collectively own all the stock of the institution, it does not follow that in an action such as this, they prosecute as the owners of said institution or for its benefit. This cannot be called a proceeding by a national banking association, and therefore it is not expressly authorized by Section 110, *supra.* (See *Wilson* vs. *Awalt, Acting Comptroller of the Currency et al.,* 2 Fed. Supp 463; *Nagle, et al.* vs. *O'Connor, Comptroller of the Currency, et al.,* 88 Fed. 2nd, 936, Cir. 3rd; *(Adams* vs. *Nagle, et al.),* 303 U. S. 532, 58 S. Ct. 687, 82 L. Ed. 999. In *Nagle, et al.* vs. *O'Connor, supra,* the District Court quashed the service upon the Comptroller, and the correctness thereof was raised in the Circuit Court which did not deem it necessary to directly pass thereon.)

The Court believes special reference to the following cases is advisable:

First National Bank of Canton, Pennsylvania vs. *John Skelton Williams, Comptroller of the Currency,* 252 U. S. 504, 40 S. Ct. 372, 64 L. Ed. 690, an action by a going national bank to restrain the Comptroller of the Currency from doing certain things under color of his office. *Wegman, et al.* v. *Hulse, et al.,* 13 Fed. 2nd, 206, an action by

stockholders as a class to restrain the Comptroller of the Currency from compromising a suit brought by the receiver appointed by him against directors of the banking association. Both cases were prosecuted for the benefit of a national banking association and for such indirect benefit to the shareholders as might arise therefrom. The real party in interest in each was a national banking association. These cases are not in conflict with the decision herein.

O'Connor, Comptroller of the Currency, et al. vs. *Watson, et al.*, 81 Fed. 2nd, 833, Cir. 5th, and *Abel, et al.* vs. *Hellawell, et al.*, 25 Fed. Supp. 446, extend the rule laid down in *First National Bank of Canton, Pennsylvania* vs. *John Skelton Williams, Comptroller of the Currency,* and *Wegman, et al.* vs. *Hulse, et al., supra,* to permit the maintenance under Section 110, *supra,* of derivative actions by shareholders seeking to relieve themselves from statutory double assessment liability. Actions by shareholders to relieve themselves from statutory double assessment liability are for the benefit of the shareholders individually, and not by or for a national banking association within Section 110, *supra.* Said cases cannot be reconciled.

The alleged service of the summons herein upon Preston Delano, Comptroller of the Currency of the United States of America, a resident, citizen and inhabitant of the District of Columbia is quashed.

The second question is:

Do creditors of a national banking association in liquidation, who accept dividends totaling the full amount of the principal sum due, thereby waive interest?

The provisions of the National Banking Act (12 U. S. C. Sections 21, *et seq.*) constitute a complete system for the establishment, government and liquidation of national banks. (*Cook Co. Nat. Bank and another* v. *United States,* 107 U. S. 445, 2 S. Ct. Rep. 561, 27 L. Ed. 537; *David* v. *El-*

mira Sav. Bank, 161 U. S. 275, 16 St. Ct. Rep. 502, 40 L. Ed. 700; *Downey* v. *City of Yonkers and three other cases,* Cir. 2nd, 106 Fed. (2d) 69; *Deitrick, Receiver* v. *Greaney,* 309 U. S. 190, 60 S. Ct. 480, rehearing denied, 309 U. S. 697, 60 S. Ct. Rep. 611.)

The Act, however, does not specifically provide for interest on claims of creditors, and the plaintiffs urge this in support of their contention that interest is not payable; and they also urge that the ratable dividend which the Comptroller is to make from time to time on claims proved to his satisfaction or adjudicated in a court of competent jurisdiction (12 U. S. C. 194) is to be estimated on the value of the claim at the time of the declaration of insolvency. (*U. S.* v. *Knox,* 111 U. S. 784, 4 S. Ct. 686, 28 L. Ed. 603; *Merrill* vs. *National Bank of Jacksonville,* 173 U. S. 131, 19 S. Ct. Rep. 360, 43 L. Ed. 640; *Kennedy* v. *Boston-Continental Nat. Bank,* Cir. 1st, 84 Fed. (2d) 592.)

U. S. v. *Knox; Merrill* v. *National Bank of Jacksonville,* and *Kennedy* v. *Boston-Continental Nat. Bank, supra,* were actions by one or more but not all of the creditors, who sought a dividend on a sum established by judgment or otherwise subsequent to insolvency, and hold there must be one rule of proportion applicable to all alike, and therefor that which is hereinafter set forth is not in conflict therewith.

The value of each claim at the time of the declaration of insolvency is the principal sum due, and it is unnecessary to reduce it to a judgment when proved to the satisfaction of the Comptroller. It then has the same efficacy as a judgment, as a claim adjudicated in a court of competent jurisdiction, and occupies the same legal ground. (*The National Bank of the Commonwealth of New York City* vs. *The Mechanics' National Bank of Trenton,* N. J., 94 U. S. 437, 24 L. Ed. 176.)

The claims herein proved to the satisfaction of the Comptroller had the same efficacy and occupied the same legal ground as judgments in the United States District Court for the District of New Jersey, and bore interest the same as judgments in the courts of the State of New Jersey (28 U. S. C. 811).

In New Jersey without benefit of statute, the practice has been for many years to allow interest to be levied under execution as an incident of the judgment, and as an increase of damages for the detention of the debt without bringing a distinct action for the interest on damages for such detention (*Cox, et al.* v. *Marlatt*, 36 N. J. L. 389).

It must also be remembered: the stockholders of the National Bank in question are individually responsible for all contracts, debts and engagements of such association, each to the amount of his stock therein at the par value thereof, in addition to the amount invested in such stock (12 U. S. C. 63, 64), and there is no reason to deny to the creditor, as against the stockholder, the same right to recover interest, which according to the nature of the contract or debt would exist as against the bank itself, even to the extent of the double assessment liability of the stockholders. (*Richmond* vs. *Irons*, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 564; *U. S. Savings Bank* vs. *Morgenthau*, Cir. 1st, 85 Fed. (2d) 811.)

Whether we hold the claims bear interest the same as judgments in the Courts of New Jersey or under the principle that creditors have the right to recover interest against the stockholder as against the bank itself, is immaterial.

It is sufficient to say that, when the creditors received the first dividend of 50%, the second dividend of 25%, the third dividend of 10%, the fourth dividend of 10% and right down to the acceptance of the fifth dividend of 5%, they had a right to interest from the date the business of the bank stopped, that is, when insolvency was declared.

The interest due them was compensation or damages for the detention of principal (*Rogers* v. *Colt*, 21 N. J. L. 18; *North River Meadow Co.* v. *Christ Church at Shrewsbury*, 22 N. J. L. 424; *Hills* v. *Aetna Life Insurance Co.*, 39 N. J. L. J. 132; *Fidelity Mut. Life Insurance Co.* vs. *Wilkes-Barre & H. R. Co.*, 98 N. J. L. 507, 120 Atl. Rep. 734; *Warren Bros. Co.* v. *Hartford Accident & Indemnity Co.*, 102 N. J. L. 616, 133 Atl. Rep. 479) not under and by virtue of an express agreement, and the general rule is, the right to recover same after the full principal obligation has been accepted is lost. (*Stewart* vs. *Barnes*, 153 U. S. 456, 14 S. Ct. 849, 38 L. Ed. 781; *Rice* vs. *Eisner*, Cir. 2nd, 16 Fed. (2d) 358; *Board of Freeholders* v. *Veghte*, 7 N. J. L. J. 145.)

The general rule aforesaid, should control herein, in the absence of an exception thereto.

The Comptroller, when he takes over a bank, is required to take possession of all bank records and assets of every description; collect all debts, dues, and claims belonging to it; on order sell or compound all bad or doubtful debts; sell all real and personal property; and, if necessary, enforce the individual liability of all stockholders. For some time it is difficult, if not impossible, for him to tell whether or not he will be in a position to pay in full the principal amount of each claim, in which event the creditors will be entitled to interest from the assets of the bank including the double liability of stockholders. Yet from time to time he is required to pay the ratable dividend hereinbefore referred to. To facilitate administration (*Sexton* v. *Dreyfus*, 219 U. S. 339; *Chemical National Bank* vs. *Armstrong*, 59 Fed. 372), it seems the perfectly rational and orderly thing to make each dividend a payment on account of principal and then when it appears that the interest or some percentage thereof can be paid, to so advise in the manner used by the receiver herein.

The written notice that a further dividend representing all or part of the accrued interest on the claim would be paid when liquidation of the remaining assets warranted, did not give the creditors any right they did not have. They had a right at the time of the fifth dividend to interest as an incident for the detention of the debt. A demand therefor, was unnecessary, the act of liquidation having dispensed therewith, (*Richmond* vs. *Irons, supra*), and to hold they should refuse the final payment on account of principal until it was ascertained whether they would receive interest and how much, and until same was paid, would frustrate the very thing the act intends and the courts want, that is, a complete, thorough and efficient administration without delay and unnecessary expense.

Creditors of a national banking association in liquidation, who are advised by the receiver prior to payment of the final dividend on account of principal, that the assets have not been fully liquidated and a further dividend representing all or part of the accrued interest on the claim will be paid when liquidation of the remaining assets warrant such a distribution, are removed from the general rule that when interest is an incident for the detention of the debt, the right to recover same after the full principal obligation has been accepted is lost.

The creditors of the New Jersey National Bank and Trust Company of Newark, New Jersey, are by reason of the facts herein, exceptions to the general rule and entitled to interest.

The motion of the receiver of the New Jersey National Bank and Trust Company of Newark, New Jersey to dismiss the complaint filed in this cause is granted.

Conclusions of Law.

An action in the District Court of New Jersey by stockholders who seek a ratable distribution of the proceeds of the assets or property of a national banking association in liquidation remaining in the hands or subject to the order and control of the Comptroller and the receiver appointed by him, without deduction of interest on the approval or adjudicated claims of creditors, is not an action by a national banking association, and therefore outside Title 28 U. S. C. Section 110, and service of summons in such an action upon the Comptroller of the Currency of the United States of America, a resident, citizen and inhabitant of the District of Columbia at Washington in said District of Columbia, should be quashed.

Creditors of a national banking association in liquidation, who are advised by the receiver prior to payment of the final dividend on account of principal that the assets have not been fully liquidated and a further dividend representing all or part of the accrued interest on the claim will be paid when liquidation of the remaining assets warrant such a distribution, are removed from the general rule that when interest is an incident for the detention of the debt, the right to recover same after the full principal obligation has been accepted, is lost.

Order Quashing Service and Dismissing Bill of Complaint.

This matter coming on to be heard upon

(a) the return of an order to show cause, dated March 4, 1940, why the relief prayed for therein should not be granted;

(b) the return of a notice of a motion by the defendant, Preston Delano, Comptroller of the Currency, appearing specially for the purpose of quashing the service of process herein against him, it appearing that the summons and complaint in this action were served upon the said defendant outside the jurisdiction of this District, to wit: in Washington, in the District of Columbia; and

(c) the return of a notice of a motion by the defendant, E. Lorry Keeton, Receiver of the New Jersey National Bank and Trust Company of Newark, New Jersey, to dismiss the complaint filed herein on the ground that the same did not set forth a good cause of action;

and the Court having examined the verified bill of complaint and the answering affidavit filed by the defendant, E. Lorry Keeton, Receiver of the New Jersey National Bank and Trust Company of Newark, New Jersey, and having heard oral argument in the presence of Kristeller and Zucker, Esqs., by Saul J. Zucker, Esq., attorneys for plaintiffs, and Harrison & Roche, Esqs., by Robert F. Darby, Esq., attorneys for the defendant, Preston Delano, Comptroller of the Currency, appearing specially, and for the defendant, E. Lorry Keeton, Receiver, etc., and having considered the briefs submitted by the attorneys for the respective parties, and by Bilder, Bilder & Kaufman, attorneys for some of the intervenors; and it being further

stipulated in open court by counsel for all of the parties herein, that the issues raised by the verified bill of complaint and the answering affidavit be considered as upon final hearing, and that the decision of this Court upon the legality, validity and efficacy of the complaint herein be deemed to constitute the final judgment adjudicating the rights of the parties herein; and the Court having duly filed its opinion herein containing the findings of fact and conclusions of law,

It is, on this 25th day of November, ORDERED, ADJUDGED and DECREED:

1. That the service of process upon the defendant, Preston Delano, Comptroller aforesaid, in Washington, in the District of Columbia, be and the same is hereby quashed.

2. That the complaint herein be and the same is hereby dismissed as not setting forth a good cause of action.

3. That any and all applications for costs and counsel fees be and the same are hereby reserved.

THOMAS GLYNN WALKER,
U. S. D. J.

Appendix to Appellees' Brief.

Treasury Department
Office Comptr Currency

G. W. M.

May 18th 1878

Sir:

I have received your letter of the 13th inst. with draft on Importers & Traders Natl Bank New York for Seven Thousand Dollars. Also your letter of the 15th inst. with drafts as stated amounting to $2,731.04. I have also received per Express One Thousand Dollars in currency advised in your letter of the 14th instant.

I have deposited these several amounts with the Treasurer U.S. for benefit of the creditors of the Commercial Natl Bank of Kansas City, Mo.

Your statement of account agrees with the books of this office with the following exceptions. At the time of the failure of the bank there was on deposit in the 5% fund only $1,250 $500 of their circulating notes having been redeemed by the Treasurer and sent to this Office and destroyed leaving outstanding circulation to be provided for $44,500 instead of $45,000 the original amount.

Of this $1250 the Treasurer transferred $492 to my credit for benefit of the creditors of the bank and has retained $758 for semi-annual duty on deposits circulation and capital stock, but has not yet been settled or allowed by me.

I have also paid $7.11 for Telegraph bills. There will now be sufficient to pay the 25% remaining due upon claims as suggested by you.

A recent decision of the Supreme Court allows creditors of insolvent banks interest upon their claims. Presuming that before this dividend could be paid you would collect enough to cover this interest I have thought best to make the final dividend to include the interest as well as the 25% due upon the original claim. I have therefore telegraphed

you—"compute interest on claims from date of proof and make checks for balance due". You will understand that the interest is to be computed at the legal rate, and is to be allowed upon the whole amount of the claim from date of proof up to the declaration of the 75% dividend, and upon the balance of 25% from the date of that dividend to the final payment.

You also enclose in your letter of the 15th the following dividend checks viz

No 33918	for	453.78	
33993	"	21	
33916	"	57	$531.78

the claims having been allowed as offsets. I have canceled these checks and return them herewith to be affixed in check book with explanation.

Very respectfully

Jno Jay Knox
Comptroller

H. B. Cullum Esq Recr
Commercial Natl Bk
Kansas City, Mo.

M. C.
McC.

Treasury Department
Office of Compt of Currency

G. W. M.

Sept 10, 1878

Sir:

I have received your letter of the 9th inst. in reference to the amount to be allowed for your salary since January 1st.

The amount named by you, $100 per month will be satisfactory.

In reference to the interest dividend I think you had better compute it upon all the claims whether demanded now or not, as if a part only are allowed it some trouble may arise hereafter and they are all entitled to it if any are.

Very respectfully,

Jno J. Knox,
Comptroller

B. W. Woodward, Esq. Recr.
Watkins Natl Bank
Watkins N. Y.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 7629. October Term, 1940.

EMIL STEIN, ET AL.,
Plaintiffs-Appellants,

VS.

PRESTON DELANO, COMPTROLLER OF THE CURRENCY, AND E. LORRY KEETON, RECEIVER OF NEW JERSEY NATIONAL BANK AND TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants-Appellees.

And afterwards, to wit, the 3d day of March, 1941, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris, Honorable William Clark and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 30th day of June, 1941, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 7629. October Term, 1940.

EMIL STEIN, ET AL.,
Plaintiffs-Appellants,

vs.

PRESTON DELANO, COMPTROLLER OF THE CURRENCY, AND E. LORRY KEETON, RECEIVER OF NEW JERSEY NATIONAL BANK AND TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants-Appellees.

No. 7644. October Term, 1940.

EDWARD M. WALDRON, ET AL.,
Plaintiffs-Appellants,

vs.

SAME,
Defendants-Appellees.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEW JERSEY.

Opinion.

(Filed June 30, 1941.)

Before MARIS, CLARK and GOODRICH, *Circuit Judges.*

CLARK, *Circuit Judge.*

The national bank whose difficulties occasioned this litigation was one of the first to bow before the storm.

The Comptroller appointed a receiver on June 11, 1932. This stitch seemed very much in time for the subsequent administration of the bank's assets resulted in the full repayment of the principal of the funds deposited. At the beginning of this administration the Comptroller exercised his statutory [1] power to assess the bank's stockholders. This assessment netted $1,000,000 approximately and there now remains on hand $750,000 after payment of the dividends before mentioned. The Comptroller now wishes to use part of these monies to pay interest to the depositors for the amounts which have been withheld from them during all the years the bank was closed and in liquidation. Certain stockholders, by way of a class action, object to such payment and demand the return of what is left of their assessment. The learned district judge held against them in a reported opinion [2] and they now appeal his decision.

The stockholders' arguments are, we think, more of policy than of law. The hostility to interest is both ancient [3] and deep-rooted. [4] It stems from the stereotyping effect of philosophy and religion on a concept changed after the adoption of the dogma. In a primitive agricultural society the weak and necessitous are at the mercy of the shrewd and unscrupulous. The commercial borrower, on the other hand, needs money to make money and should be treated accordingly. [5] In general realization of this, the Roman law permitted recompense for failure to repay. From this we derive the name itself (id quod interest, that which is between). By the Sixteenth Century the gap between religious theory and commercial practice had been further narrowed. The new Protestant ethical system regarded only excessive exactions as usury. Even then the English

[1] 12 U. S. C. A. § 63.
[2] Stein v. Delano, 35 F. Supp. 260.
[3] Plato, Treatise de Legibus, v. 742; Aristotle, Politics, 1, 4, 23; Moses, Exodus, XXII, 25.
[4] Holdsworth, 8 History of English Law (2d ed.) 100-112; Bellott's Bargains With Money Lenders, Chapter 1.
[5] Bacon's Essay on Usury.

law wavered about what was excessive, swinging from statutory maximums [6] to control by the courts of conscience [7] and back to statutory maximums in the case of the poor debtor who took the place of the poor peasant of earlier days. [8] Our own law was formed at the period of rigid maximums. In this country, however, mercantile influence seemed less in awe of traditional theology and the courts were less intransigent toward the extension of the limits of the recovery of interest as damages. [9]

In the case at bar the aversion to paying for the money you hire is combined with another distaste. Stockholders in banks have shown a reluctance to accept the condition upon which they have been allowed to take charge of other people's money. That condition is a partial withdrawal of the shield afforded by the corporate device. The device limits the owner's risk and the creditor's security simultaneously. [10] It seems reasonable to increase both in a business where the owners take most of the profit and the customers take most of the risk. As long ago as 1808 Pennsylvania had had the idea [11] and in 1846 the New York Constitution "reflected the prevailing grievance of the time" and imposed superadded liability about as we know

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[6] 37 Henry VIII, c. 9; 5, 6, Edward VI, c. 20.

[7] See Chesterfield v. Janssen, 1 Ark. 339, 26 Eng. Rep. 191 (1750); Earl of Aylesford v. Morris (1883); L. R. 8, Ch. 484.

[8] Money-lender's Acts, 63 and 64 Victoria, c. 51; 1 and 2 George V, c. 38; 17 and 18 George V, c. 21; compare the controversy in our own country over small loan finance companies, Stone and Thomas, California's Legislature Faces the Small Loan Problem, 27 California Law Review 286; Loan Sharks and Loan Shark Legislation, 8 Journal of Criminal Law 69; Bar Defeats Loan Sharks, 10 Missouri Bar Journal 44; Bar Sponsors Anti-Loan Shark Bill, 10 Missouri Bar Journal 3.

[9] 1 Sedgwick, Damages (9th ed.) §297; 30 Amer. Jur. Interest §§ 3 and 4, and cases cited; cf. Knight, Interest, 8 Ency. of Social Sciences p. 131; Clark, Capital and Its Earnings, American Economic Association, Monographs, vol. 3, no. 2; Clark, Distribution of Wealth; Fetter, Economic Principles, Pt. 5; Fetter, Interest Theories Old and New, 4 American Economic Review 68; Fisher, The Rate of Interest; Fisher, The Theory of Interest; Cassel, The Nature and Necessity of Interest; Landry, L'interet Du Capital.

[10] The origin of limited liability for stockholders appears to be in dispute. Compare Williston, Law of Business Corporations, 2 Harvard Law Review 105, 149, 160-162 with Warren, Safeguarding The Creditors of Corporations, 36 Harvard Law Review 509, 516-522.

[11] Myers v. Irwin, 2 Serg. & R. (Pa.) 368.

it today.[12] Now nearly a hundred years later the pendulum has swung back and many of the statutes and constitutions imposing liability have been repealed or amended.[13] The exact reason for this change of legislative heart is not difficult of explanation. The panic of 1929 and the bank failures of 1932-1933 have made bank stockholders into a suffering and so vocal class. Many of them interposed every possible defense against collection.[14] Finally, a combination of these two factors suggested that the stockholders keep the profit, the depositors have their security, and the government take the risk.[15]

We have discussed these two hostilities at some length because they seemed to us the only way of accounting for the earnestness with which the principal case has been pressed. For the law is well-settled and is with the Comptroller.[16] Three reasons are generally given for this rule. The delay in payment is not the act of the debtor but is an act of the law for the mutual benefit of all the creditors.[17]

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[12] 3 Zollman, Banks and Banking (Perm. Ed.) § 1611, Early History of Superadded Liability.

[13] 12 U. S. C. A. § 64a; Ga. Laws 1937, No. 492, p. 429, § 1; Ind. Stat. Ann. (Burns, Supp. 1939) § 18-1902; Iowa Laws 1936-1937, c. 219, § 1; Kan. Gen. Stat. Ann. (Corrick, Supp. 1937) § 9-110; Ky. Stat. Ann. (Baldwin, 1936) § 595; Me. Laws 1935, c. 287, p. 47; Md. Laws 1937, c. 81, § 1; Mass. Ann. Laws (Supp. 1938) c. 172, § 24; Mich. Comp. Laws (Mason, Supp. 1935) § 11899-1; Nev. Comp. Laws (Hillyer, Supp. 1938) § 661; N. Y. Laws 1936 c. 831, § 120-a; N. C. Code Ann. (1935) § 219a; N. D. Laws 1937, c. 95; Pa. Stat. Ann. (Purdon, 1939) tit. 7, c. 29, § 819-614; Tex. Const. Art. XVI, § 16; Vt. Pub. Laws (1933) § 6810; Ariz. Const. Art. XIV, § 11; Ill. Const. Art. XI, § 6; Minn. Const. Art. IX, § 13; Nebr. Const. Art. XII, § 7; Ohio Const. Art. XIII, § 3; Ore. Const. Art. XI, § 3; S. C. Const. Art. IX, §18; Utah Const. Art. XII, § 18; Wash. Const. Art. XII, § 11; W. Va. Const. Art. XI, § 6.

[14] Banks and Banking—Stockholders' Superadded Liability—Liability for Interest and Cost of Receivership, 39 Columbia Law Review 1414.

[15] 12 U. S. C. A. § 264. Federal Deposit Insurance Corporation. Of course, the risk is no more than that borne by any insurer and is ultimately distributed among those insured.

[16] The cases are collected in 3 Zollman, Banks and Banking (Perm. Ed.) § 1781, Interest on Debt to Which Superadded Liability Attaches; 3 Michie, Banks and Banking (Perm. ed.) § 219 Interest: Right to and Liability For; Banks and Banking—Stockholders' Superadded Liability—Liability for Interest and Cost of Receivership, 39 Columbia Law Review 1414 (note); Banks and Banking—Insolvency and Dissolution—Allowance of Interest on Claims, 3 Detroit Law Review 188.

[17] People v. American Loan & Trust Co., 172 N. Y. 371, 65 N. E. 200; Boston & A. R. R. v. Mercantile Trust & Deposit Co., 82 Md. 535, 34 A. 778, 38 L. R. A. 97; Attorney General v. Supreme Council A. L. H., 206 Mass. 131, 92 N. E. 134.

In the case of claims bearing different rates of interest, it would be inequitable to permit the running of interest to increase the proportion of the assets to which some of the creditors are entitled at the expense of other creditors while the estate is in the process of administration.[18] If all claims bear the same rate of interest, the addition of interest would not change the proportion of the assets to which each would be entitled. The computation may therefore be omitted as a useless act.[19] It is apparent that the last two reasons are not valid in the face of a surplus. The logic of a writer in the Michigan Law Review seems unanswerable:

> "On the other hand, when the surplus is sufficient to pay in full the interest due to all the creditors, a difference in the rates provided by their contracts is not productive of any unjust inequality between them. The rights of one are in no way affected by the amount received by another. An amount equal to the principal is paid to each. Even where the surplus will not pay all the interest in full, no unjust inequality results from dividing it on the basis of different contract rates. The balance remaining due is proportioned to the compensation that each should receive for the use of his money. There is no injustice in computing the proportion of compensation to be received by each creditor on the basis of the rate of compensation for which he contracted. This is an entirely different matter than decreasing the porportion of *principal* to be received by one creditor by adding interest at a higher rate in computing the dividend of another creditor. And where there is a surplus, the computation and addition of interest to all claims at the same rate would no longer be a useless act."
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> Hanson, Effect of Insolvency Proceedings on Creditor's Right to Interest, 32 Michigan Law Review 1069, 1082-1083.

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[18] American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U. S. 261; People v. Merchants' Trust Co., 187 N. Y. 293, 79 N. E. 1004.
[19] Re John Osborn's Sons Co., 177 Fed. 184, 29 L. R. A. (N. S.) 887.

The third remains but is particularly unsound in the superadded liability cases. In an ordinary involuntary insolvency the prevention of paying may in a sense be attributed to the law and not to the debtor. If there is a surplus, therefore, it may be argued that the proceedings were wrongfully instituted and so the debtor should be excused from paying interest during the delay. Even here a large majority of the creditors may have nothing to do with the commencement of the proceedings and the debtor may be at fault in conducting his business in such a way as to subject himself to reasonable suspicion of insolvency. In the bank cases the surplus arises only from the very cause that the stockholders now assign as an excuse for getting it back. Zollman, a leading authority on the subject, puts it thus:

> "Where a bank is so badly insolvent that the entire superadded liability of the stockholders when collected is insufficient to pay the principal of its debt, no question can arise whether its creditors are to receive interest. Any computation of such interest would be a useless effort. However, some of the bank failures are not of this description. It happens that a *portion* of the superadded liability is sufficient to pay the principal of all the debts. The question then arises whether the creditors are entitled to interest as against the stockholders. It is clear that the contracts, debts, and engagements of the bank have not been fulfilled so long as interest is unpaid. It may be a hardship on the stockholders to hold them for interest accruing during the delay of administration. It certainly is a hardship on the creditors to lose this interest. The question, however, is not one of hardship, but of legal right. Within the statutory limits the stockholder is bound for the whole debt and not for a part of it . . .
>
> "A depositor whose claims are due on demand is

entitled to interest on his deposits from the time when the bank becomes insolvent, closes its doors, and suspends payment . . .''

3 Zollman, Banks and Banking (Perm. ed.) § 1781.[20]

The only escape from the authorities lies in accession to the arguments with which we began this opinion. They are, as we pointed out, considerations of policy. We do not happen to agree with the policy and are therefore happy in following what we consider binding authority, alterable as always by legislative action. The appellants' attempt at avoidance by way of distinction does not impress us. They argue first that the stockholders' responsibility is limited by the statutory language, ''contracts, debts and engagements'',[21] and second that the acceptance of the principal waives the right to interest. To so interpret the statute would be to interpolate the words ''principal amount of'' before ''debt''. That would, of course, be contrary to a general usage whereby the latter term connotes no such qualification. The authorities are unanimous in their rejection of any such view. Fletcher Cyclopedia Corporations collects them and says:

> ''When a liability for interest is a debt against the corporation, it is like any other debt, and the stockholders are liable therefor, as well as for the principal, provided, of course, they are not thereby held to any greater liability in amount than is fixed by the statute. The statutory liability of stockholders extends to interest on the debts of the corporation during the administration of its affairs in case of bankruptcy, insolvency, or receivership, where, because of the nature of the debt, the right to recover interest would have existed against the corporation . . .''
>
> 13 Fletcher Cyclopedia Corporations § 6299.

[20] Creditors' Rights—Banks and Banking—Secured Creditors' Rights to Lien for Interest and Principal of Debt Owed By An Insolvent Bank, 24 Virginia Law Review 803 (note); Glenn, Liquidation § 488.

[21] 12 U. S. C. A. § 63.

The rule as to waiver of interest is equally inapplicable. It does not apply in receiverships for the reason that during the administration nothing could have been accomplished by a formal demand for interest. Until the principal of all the claims are paid it can not be known whether the estate would have enough remaining assets to make payment upon the interest. Therefore there can be no waiver of the claim for interest.[22] The writer of the law review article from which we have already quoted summarizes the matter thus:

> "Even if it be conceded that the dividends are principal, it should not follow that the obligation for interest is thereby extinguished. The rationale of the general rule in this regard is that when the creditor *voluntarily* accepts the principal as such, he ought to be regarded as having waived the interest. In the insolvency cases there is no voluntary acceptance of principal because the creditor is precluded from rejecting the dividends and demanding payment of principal and interest in full."
>
> Hanson, Effect of Insolvency Proceedings on Creditor's Right to Interest, 32 Michigan Law Review 1069, 1085.

Although not mentioned below, the appellants now argue against the imposition of the legal rate of interest. They claim that the statute[23] authorizes the payment of the prevailing interest rate with a maximum of six per cent. This contention is in accord with economic law.[24] As we have

[22] State ex rel. McConnel v. Park Bank and Trust, 151 Tenn. 195, 268 S. W. 638; Greva v. Rainey, 2 Cal. (2) 338, 41 Pac. (2d) 328; Flynn v. American Banking and Trust Co., 104 Me. 141, 69 A. 771; Parker v. Adams, 38 Misc. 325, 77 N. Y. S. 861; see also 39 A. L. R. 457; 44 A. L. R. 1162; Glenn, Liquidation § 488.

[23] N. J. R. S. 31:1. Even before Erie v. Tompkins, Federal courts awarded interest on damages at rates set by state law. See interest Rates in Federal Courts, 44 Harvard Law Review 105.

[24] Knight, Interest, 8 Ency. of Social Sciences 131.

pointed out earlier, however, our law is derived from the period of compromise between no interest and usury. In New Jersey there can be no doubt. [25] The appellants cite in support of their argument three cases. [26] The two latter are not in point. In each the defendant wrongfully withheld money from the plaintiff in lieu of borrowing that sum. The defendant was therefore assessed for the amount he profited by the use of the wrongfully withheld money—its interest at the rate he would have had to pay for the loan. But the New Jersey National Bank and Trust Company did not profit to any ascertainable amount by becoming insolvent and failing to pay its depositors. It is being assessed interest for the damage it did its creditors, rather than for any profit it obtained from the failure to honor its debts. The remaining authority, Jersey City *v.* O'Callaghan, is said to contain language which states that the statutory rate is merely the presumed legal rate.

> "The law takes the legal rate of interest as the fair measure of such damages, on the theory that if the money had come to hand it would have produced that rate. The law endeavors to indemnify the party injured, and as the injury consists in the loss of the use of money, such indemnification will be afforded by giving the value of such use, *which it is presumed is the interest at the rate fixed by law,* and to accomplish this it is obvious that when the rate of interest is changed, the standard of damages is necessarily changed, for to take either the greater or lesser sum of the varying interest would be to use a gauge out of proportion to the loss and would manifestly fail to produce a just compensation. . . . *To compensate the party injured, and to do nothing more than*

[25] Jersey City v. Flynn, 74 N. J. E. 104, 70 A. 497.
[26] Jersey City v. O'Callaghan, 41 N. J. L. 349; Agnew Co. v. Patterson Bd. of Education, 83 N. J. E. 49, 89 A. 1046; Homer v. Heinecke, 86 N. J. E. 176, 98 A. 393.

> *to compensate him, the measure of damages should be the rate of interest as it is varied by legislation during the period of damage."*
>
> Jersey City *v.* O'Callaghan, 41 N. J. L. 349, 354 (italics ours).

We believe that the appellants have twisted the meaning of this opinion by attaching overdue importance to the words first italicized and not enough to the second italicized sentence. If the statute is presumed to be the legal interest rate, that presumption is conclusive. Our construction of the decision is the one adopted by the New Jersey courts.

> "The rate chargeable for the forbearance of money is, in the absence of agreement to the contrary, the legal rate. Jersey City *v.* O'Callaghan, 41 N. J. L. 349, is in point. It was there held by the court of Errors and Appeals that where damages for breach of contract are to be assessed or where an equivalent is to be given for the use of money forborne, the statutory rate is the rate to be computed. If, then, interest be given at all, it would be given at the rate of 6%."
>
> Jersey City *v.* Flynn, 74 N. J. E. 104, 124, 70 A. 497, 505, modified as to another point, 76 N. J. E. 607, 76 A. 3.

The learned trial court quashed the summons against the Comptroller. As we view it, the question there involved, although interesting, need not have been considered. The Comptroller's agent, the receiver of the bank, has appeared in the action and will be bound by our decision.[27] That being so, any adjudication with respect to jurisdiction over the Comptroller would be in the form of an advisory opin-

[27] Appendix to appellees' brief, p. 9.

ion. [28] That the courts of this country are not authorized to give.

The judgment of the District Court is affirmed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[28] Hudson, Advisory Opinions of National and International Courts, 37 Harvard Law Review 970; Frankfurter, A Note on Advisory Opinions, 37 Harvard Law Review 1002; The Advisory Opinion and the United States Supreme Court, 5 Fordham Law Review 94, 114 (note); cf. Borchard, The Constitutionality of Declaratory Judgments, 31 Columbia Law Review 561.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 7629. October Term, 1940.

EMIL STEIN, ET AL.,
Plaintiffs-Appellants,

vs.

PRESTON DELANO, COMPTROLLER OF THE CURRENCY, AND E. LORRY KEETON, RECEIVER OF NEW JERSEY NATIONAL BANK AND TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants-Appellees.

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

WILLIAM CLARK,
Circuit Judge.

Philadelphia,
June 30, 1941.

Endorsements—

Order Affirming Judgment
Received & Filed June 30, 1941
Wm. P. Rowland, Clerk

UNITED STATES OF AMERICA
EASTERN DISTRICT OF PENNSYLVANIA } *Sct.*
THIRD JUDICIAL CIRCUIT

I, WM. P. ROWLAND, Clerk of the United States Circuit Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original Appendices to the briefs of appellants and appellees, as constituting the portions of record before this Court at argument; and proceedings in this Court in the case of Emil Stein, et al., appellants *vs.* Preston Delano, Comptroller of the Currency, et al., appellees, No. 7629, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said
(Seal) Court, at Philadelphia, this 17th day of July in the year of our Lord one thousand nine hundred and forty-one and of the, Independence of the United States the one hundred and sixty-sixth.

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals,
Third Circuit.